

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**  
**IN AND FOR NEW CASTLE COUNTY**

COMMONWEALTH CONSTRUCTION CO.	)	
	)	
Plaintiff,	)	
v.	)	
	)	C.A. No. 08C-01-266 RRC
ENDECON, INC. and	)	
DESMOND BAKER,	)	
	)	
Defendants.	)	

Submitted: January 2, 2009  
Decided: March 9, 2009

On Defendants' Motion to Dismiss.  
**DENIED.**

**MEMORANDUM OPINION**

Donald L. Logan, Esquire, and Victoria K. Petrone, Esquire, Logan & Associates, LLP, New Castle, Delaware, Attorneys for Plaintiff.

Paul Cottrell, Esquire, and Justin P. Callaway, Esquire, Tighe & Cottrell, P.A., Wilmington, Delaware, Attorneys for Defendants.

COOCH, J.

## **I. INTRODUCTION**

Plaintiff's claim in this case stems from a contract dispute that arose between Plaintiff and Cornerstone Fellowship Baptist Church ("Cornerstone") during the renovation of Cornerstone's church. Defendants, who served as architect/engineer for the renovation, advised Cornerstone to withhold payment from Plaintiff for the work Plaintiff had completed. Plaintiff thereupon filed a mechanic's lien and expended over \$100,000 in attorneys' fees, expert fees, and court costs to secure payment from Cornerstone. Defendants apparently advised Cornerstone to file a counterclaim in that litigation, which it did.

In connection with Defendants' role in advising Cornerstone, (the basis of this second related case) Plaintiff originally identified three grounds for recovery: Count I "negligence," Count II "bad faith," and Count III "tortious interference with contractual relations." However, Plaintiff has withdrawn grounds one and two, leaving only its claim for tortious interference with contractual relations. Defendants, in their motion to dismiss, primarily assert that Plaintiff's claim for tortious interference with contractual relations is barred by the economic loss doctrine, which doctrine prevents recovery in tort for losses that are solely economic in nature.

Upon review of the facts, the law, and the parties' submissions, Defendants' Motion to Dismiss Count III, tortious interference with contractual relations, is DENIED.

## **II. FACTUAL AND PROCEDURAL BACKGROUND<sup>1</sup>**

Plaintiff Commonwealth Construction Company ("Commonwealth") was retained by Cornerstone in 2003 to renovate its church. Endecon provided architectural and engineering services for the renovation of Cornerstone. Desmond Baker ("Baker") served as the principal consultant for Endecon during the renovation. While Baker's title was "Project Architect," he was not a Delaware licensed architect; rather, Baker was a professional engineer licensed by the Delaware Association of Professional Engineers ("DAPE").

The contract between Plaintiff and Cornerstone provided that any disputes first would be resolved by submission to Defendants. The contract required Defendants to make interpretations of the contract and decide disputes between Plaintiff and Cornerstone in good faith and without partiality to either party.

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<sup>1</sup> The following pertinent facts are set forth in the Complaint. Docket Item ("D.I.") 1 at 1-3. For a further more detailed recitation of the facts, *see also Commonwealth Constr. Co. v. Cornerstone Fellowship Baptist Church, Inc.*, 2006 WL 2567916 (Del. Super.) (holding after bench trial that Cornerstone breached its contract with Commonwealth by failing to comply with the payment provisions of the contract).

A dispute arose between Plaintiff and Cornerstone concerning payment to Plaintiff for certain work performed in connection with the renovation. Plaintiff and Cornerstone submitted the dispute to Defendants, in compliance with the terms of the contract. Based on the advice of Defendants, Cornerstone refused to pay Plaintiff. Subsequently, Plaintiff filed a mechanic's lien and an *in personam* complaint against Cornerstone in this Court.<sup>2</sup> In response, Cornerstone alleged a counterclaim for fraud and breach of contract in the amount of \$973,491.91, apparently based on the advice and recommendation of Defendants.

After a bench trial in December 2005 in connection with the mechanic's lien and the *in personam* complaint, judgment was entered in favor of Plaintiff for the entirety of its claim against Cornerstone in the amount of \$366,342. Cornerstone's counterclaim was denied. The court did not award attorneys' fees to Plaintiff, finding that the circumstances necessary to constitute "bad faith" on the part of Cornerstone were not present.<sup>3</sup>

Plaintiff then filed a complaint with this Court in January 2008 in the instant matter alleging negligence, bad faith and tortious interference with

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<sup>2</sup> *Commonwealth Constr. Co.*, 2006 WL 2567916 at \*1.

<sup>3</sup> *Id.* at \*25-26.

contractual relations; however, the first two claims were subsequently withdrawn. Plaintiff seeks over \$100,000 in damages as compensation for attorneys' fees, expert fees, and court costs that Plaintiff expended to secure payment from Cornerstone. Plaintiff has plead the following alleged wrongful acts by Defendants in connection with its remaining claim of tortious interference with contract:

18. a. Advising Cornerstone to withhold payment to Plaintiff of over \$300,000 on the basis of outstanding work remaining to be done, although certifying that Plaintiff had completed 96.5% of the work and, accordingly, only \$81,000 should have been withheld.
- b. Testifying at trial that Cornerstone was entitled to a credit from Plaintiff of \$6,400 for the removal of stage curtains, despite the fact that Defendants knew the work was done for free by volunteers.
- c. Testifying at trial that Cornerstone was entitled to recover \$96,000 from Plaintiff for a new roof, without inspecting the condition of the roof.
- d. Estimating the value of materials to relocate the audio-visual room at \$3.30 per square foot, when the actual cost was 9 to 11 cents per square foot.
- e. Refusing to issue a certificate of substantial completion to Plaintiff, although Plaintiff had achieved substantial completion as defined by the Cornerstone Contract General Conditions.<sup>4</sup>

Defendants filed their motion to dismiss on March 18, 2008.

\* \* \* \*

In May 2008, pursuant to 24 *Del. C.* § 2824(a),<sup>5</sup> Plaintiff filed a complaint with DAPE alleging that Defendants had violated the following provisions of DAPE's Code of Ethics:

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<sup>4</sup> Compl. at 2-3, ¶ 18.

<sup>5</sup> 24 *Del. C.* § 2824(a) states: "[w]hether prompted by receipt of a complaint or upon its own initiative, the Council or its investigating committee may review the actions and representations of applicants, adjunct and affiliate members, and any person licensed

3. The Engineer shall issue professional statements only in an objective and truthful manner.
  - A. The engineer shall be completely objective and truthful in all professional reports, statements, or testimony, and shall include all relevant and pertinent information.
  - B. The engineer shall publicly express a professional opinion on technical subjects only when it is founded on adequate knowledge of the facts and competence in the subject matter.<sup>6</sup>

The DAPE complaint filed by Plaintiff restated nearly verbatim all the allegations averred in the instant action, including 1) that Defendants interfered with Plaintiff's contract with Cornerstone in "bad faith," and 2) that Defendants engaged in "intentional and calculated conduct to protect his own self interest."<sup>7</sup> In addition to the complaint, Plaintiff provided DAPE with trial transcripts, discovery documents, and Defendant Baker's prior sworn deposition testimony.<sup>8</sup>

DAPE, through its investigator, Arkan Say, P.E., interviewed Baker in connection with Plaintiff's allegations and the documents submitted by Plaintiff to DAPE. Based on the recommendation of the Ethics Committee, DAPE issued a decision dated July 14, 2008, dismissing the complaint. The

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under this chapter for violations under § 2823 of this title." In pertinent part, 24 *Del. C.* § 2823(a)(3) provides that "disciplinary penalties" for "violation of the code of ethics promulgated by the Council."

<sup>6</sup> Defs. Supp. Letter Brief on Effect of DAPE Decision, D.I. 13 at 3, Ex. C.

<sup>7</sup> *Id.* at Ex. A ¶ 11, 14.

<sup>8</sup> *Id.* at ¶ 19.

following constitutes the entirety of the substantive portion of DAPE's decision:

The Law Enforcement/Ethics Committee recommended to the Council of the Delaware Association of Professional Engineer closure of File 08/101. At the conclusion of our investigation, there is no evidence to support either a violation of the Delaware Professional Engineers Act or the Code of Ethics. This file was approved for closure. Thank you for [your] interest in maintaining compliance with the law and in the resolution of this matter.<sup>9</sup>

### **III. CONTENTIONS OF THE PARTIES**

First, Defendants maintain that Plaintiff's claim for tortious interference with contractual relations is barred by the economic loss doctrine. Specifically, Defendants maintain that the economic loss doctrine bars recovery in tort for damages which are the result of inadequate value, costs of repair, or loss of profits where there is not a corresponding claim for personal injury or damage to other property.

Second, Defendants contend that Defendant Baker's statements made during trial in the underlying litigation—by way of example, Baker's testimony that Cornerstone was entitled to a credit for removal of stage curtains and that Cornerstone was entitled to a new roof—are protected by

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<sup>9</sup> Letter from Delaware Assoc. of Professional Engineers to Desmond Baker, D.I. 12. This Court observes that 24 *Del. C.* § 2824(b)(1)(A) requires the Investigating Committee (not DAPE) to "recite verbatim all complaint allegations that are recommended for dismissal, indicating the Investigating Committee's reasoning for recommending dismissal of each allegation." A majority vote is required to approve the recommendation of the Investigating Committee. Section 2824 does not require DAPE to publish the Investigating Committee's reasoning for its recommendation.

reason of Defendants' entitlement to "witness immunity" (a witness being immune from suit for statements made in the course of judicial proceedings where the statement was relevant to a contested issue in the case).

Third, Defendants contend that Plaintiff's claim is now collaterally estopped by the July 2008 decision of DAPE.

Fourth, Defendants maintain that even if Plaintiff establishes at this juncture a claim for tortious interference with contract, any interference was proper in that, Defendants assert, Defendants provided "objective" and "honest" advice.

In response, Plaintiff contends that the economic loss doctrine does not apply to Plaintiff's claim for tortious interference with contractual relations because tortious interference with contractual relations is an intentional tort, unlike negligence, and requires an intentional act on the part of the defendant.

Second, Plaintiff maintains that its claim is not barred by witness immunity because Defendants' actions and statements that formed the basis of Plaintiff's instant action occurred prior to the underlying litigation and that Defendants' statements at trial were referred to because they are representative of Defendants' pre-trial statements.



Third, Plaintiff contends that the instant action is not collaterally estopped by the DAPE decision because the issues decided by DAPE were not “identical” to the issues presented in the instant action and because Plaintiff did not have a full and fair opportunity to litigate the issues in this case in the prior action before DAPE.

Fourth, Plaintiff maintains that Defendants’ tortious interference with contract was improper because Defendants advice was untruthful and dishonest.

#### **IV. STANDARD OF REVIEW<sup>10</sup>**

When deciding a motion to dismiss, “all factual allegations of the complaint are accepted as true.”<sup>11</sup> A complaint will not be dismissed under Superior Court Civil Rule 12(b)(6) “unless it appears to a certainty that under no set of facts which could be proved to support the claim asserted would the plaintiff be entitled to relief.”<sup>12</sup> Therefore, the Court must determine “whether a plaintiff may recover under any reasonably

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<sup>10</sup> The parties agreed at oral argument that the instant motion is properly before this Court as a motion to dismiss, and ought not to be converted to a motion for summary judgment. Tr., D.I. 16 at 22-26.

<sup>11</sup> *Plant v. Catalytic Constr. Co.*, 287 A.2d 682, 686 (Del. Super. 1972), *aff’d* 297 A.2d 37 (Del. 1972).

<sup>12</sup> *Id.*

conceivable set of circumstances susceptible of proof under the complaint.”<sup>13</sup>

## V. DISCUSSION

### A. The Economic Loss Doctrine Does Not Bar a Claim for Tortious Interference with Contract

The first issue is whether a claim for tortious interference with contractual relations is barred by the economic loss doctrine. This is an issue of apparent first impression in Delaware. The economic loss doctrine essentially prevents a plaintiff from recovering in tort “for losses that are solely economic in nature.”<sup>14</sup> The Delaware Supreme Court has explained the purpose of the economic loss doctrine:

The economic loss doctrine is a judicially created doctrine that prohibits recovery in tort where a product has damaged only itself (i.e., has not caused personal injury or damage to *other* property) and, the only losses suffered are economic in nature. The rationale underlying the economic loss doctrine is best understood by considering the distinct functions served by tort law and contract law. “The concept of duty is at the heart of the distinction drawn by the economic loss doctrine.” Products-liability tort law has evolved to protect the individual and his property from the risk of physical harm posed by dangerous products. Contract-warranty law has evolved to protect a different interest: . . . the “bargained for expectations” of both contracting parties and other foreseeable users who suffer loss when a product is unfit for its intended use.<sup>15</sup>

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<sup>13</sup> *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

<sup>14</sup> *Christiana Marine Servs. Corp. v. Texaco Fuel and Marine Mktg. Inc.*, 2002 WL 1335360 (Del. Super.).

<sup>15</sup> *Danforth v. Acorn Structures, Inc.*, 608 A.2d 1194, 1195-96 (Del. Supr. 1992) (quoting *Lincoln Park West Condominium Ass’n v. Mann*, 555 N.E.2d 346, 351 (Ill. 1990)).

Delaware courts have applied the economic loss doctrine outside the realm of defective products to bar claims for negligent management<sup>16</sup> and negligent breach of a service contract.<sup>17</sup>

However, as *Brunner & O'Connor on Construction Law* notes,

[e]xceptions to the economic loss doctrine are legion, and have been judicially recognized in disputes involving multiple parties not in privity with each other, but whose duties either are collectively "rooted in contract" or involve an individual party whose egregious conduct warrants an exception as a matter of social policy.<sup>18</sup>

Delaware courts, also, have recognized exceptions to the economic loss doctrine. For example, the doctrine does not bar claims for the tort of negligent misrepresentation if (1) the defendant supplied the information to the plaintiff for use in business transactions, and (2) the defendant is in the business of supplying information.<sup>19</sup> While it is true that Delaware courts have declined to apply the negligent misrepresentation exception to the

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<sup>16</sup> *Int'l Fid. Ins. Co. v. Mattes Elec., Inc.*, 2002 WL 1400217 (Del. Super.) (holding that negligence claim against contract manager of construction project was barred by the economic loss doctrine).

<sup>17</sup> *J.W. Walker & Sons, Inc. v. Constr. Mgmt. Serv., Inc.*, 2008 WL 1891385 (Del. Super.) (holding that negligence claim by subcontractor against contractor only alleging economic losses was barred by the economic loss doctrine).

<sup>18</sup> 6 BRUNER & O'CONNOR ON CONSTRUCTION LAW § 19:10 (quoting PROSSER & KEETON ON TORTS § 92 at 659 (5th ed. 1984)).

<sup>19</sup> *Millsboro Fire Co. v. Constr. Mgmt. Serv.*, 2006 WL 1867705, \*3 (Del. Super.) (adopting the approach of the Restatement (Second) of Torts § 552, which provides an exception for negligent misrepresentation); *Christiana Marine Serv. Corp. v. Texaco Fuel and Marine Mktg., Inc.*, 2002 WL 1335360 (Del. Super.).

economic loss doctrine in particular situations to an engineer or architect, holding that the engineer or architect was not “in the business of supplying information,” those cases did not address the specific issue *sub judice*—whether the economic loss doctrine bars a claim for tortious interference with contract.<sup>20</sup>

With respect to intentional torts, this Court has declined to apply the economic loss doctrine to bar the tort of fraudulent inducement,<sup>21</sup> and the United States District Court for the District of Delaware, applying Delaware law, has refused to apply the economic loss doctrine to bar the tort of intentional misappropriation of trade secrets.<sup>22</sup>

Other jurisdictions have discussed the interplay between the economic loss doctrine and intentional torts and have often found that the doctrine

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<sup>20</sup> See *Millsboro Fire Co. v. Constr. Mgmt. Serv.*, 2006 WL 1867705, \*3 (Del. Super.) (granting a Joint Motion for Summary Judgment on the third-party complaint and holding that the third party defendants who provided architectural and engineering services did not engage in the business of supplying information, but, rather, incidentally supplied information in connection with the construction and renovation of a fire hall); *Delaware Art Museum v. Ann Beha Architects, Inc.*, 2007 WL 2601472 (D. Del.) (dismissing negligent misrepresentation claim against engineering firm because it did not act as a “pure information provider,” and thus finding that the second requirement for the plaintiff’s negligent misrepresentation claim was not met).

<sup>21</sup> *Brasby v. Morris*, 2007 WL 949485, \*7 (Del. Super.) (holding that economic loss doctrine does not bar suit for the tort of fraudulent inducement).

<sup>22</sup> *Bell Helicopter Textron, inc. v. Tridair Helicopters, Inc.*, 982 F.Supp. 318, 322 (D. Del. 1997) (holding that economic loss doctrine does not extend to tort of trade secret misappropriation).

does not bar recovery for several intentional torts.<sup>23</sup> Thus, in *Huron Tool and Engineering Co. v. Precision Consulting Services, Inc.*, the Michigan Court of Appeals rejected the defendant's contention that the economic loss doctrine barred all tort actions, noting,

[a]lthough the issue has been addressed in only a handful of jurisdictions, the emerging trend is clearly toward creating an exception to the economic loss doctrine for a select group of intentional torts.<sup>24</sup>

Drawing on cases from several jurisdictions, the *Huron* Court identified the “select group” of intentional torts as: defamation, fraudulent inducement to contract, fraudulent misrepresentation, intentional misrepresentation, tortious interference with prospective economic advantage, and intentional interference with contractual relations.<sup>25</sup>

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<sup>23</sup> See RESTATEMENT (SECOND) OF TORTS § 766 (1979) (discussing application of economic loss doctrine to claim of tortious interference with contract); Brian G. Gilpin and John Scott Hoff, *The Economic Loss Doctrine: The Death of Subrogation*, 10-SPG AIR & SPACE LAW. 1, n. 16 (1996) (noting exceptions to the economic doctrine recognized by Illinois courts including intentional and negligent misrepresentation, attorney and accountant malpractice actions, insurance broker negligence, and tortious interference with contractual relations or prospective economic advantage).

<sup>24</sup> *Huron Tool and Engineering Co. v. Precision Consulting Services, Inc.*, 532 N.W. 2d 541, 544 (Mich.App. 1995) (holding that fraud in the inducement is not barred by the economic loss doctrine).

<sup>25</sup> *Id.* (citing *Interstate Securities Corp. v. Hayes Corp.*, 920 F.2d 769 (11th Cir.1991) (defamation); *Northern States Power Co. v. Int'l Telephone & Telegraph Corp.*, 550 F.Supp. 108 (D.Minn. 1982) (fraudulent inducement to contract and misrepresentation); *Moorman Mfg. Co. v. Nat'l Tank Co.*, 435 N.E.2d 443 (Ill. 1982) (intentional misrepresentation); *Werblood v. Columbia College of Chicago*, 536 N.E.2d 750 (Ill.App. 1989) (tortious interference with prospective economic advantage); *Santucci Construction Co. v. Baxter & Woodman, Inc.*, 502 N.E.2d 1134 (Ill.App. 1987) (intentional interference with contractual relations)).

In *Santucci Construction Co. v. Baxter & Woodman, Inc.*, cited in *Huron*, the Illinois Court of Appeals held that the economic loss doctrine did not bar a plaintiff's claim for intentional interference with contract because "the very interest protected by the torts of intentional interference with contractual relations and prospective advantage is the reasonable expectation of economic advantage, [therefore,] economic losses are the damages recoverable."<sup>26</sup>

In addition, in *Shands Teaching Hospital and Clinics, Inc. v. Beech Street Corp.* the Florida Court of Appeals reversed the trial court's application of the economic loss doctrine to bar a plaintiff's claim for tortious interference with contract, noting that the parties were not in privity and that the parties cannot "protect their economic interests through contract when they have not contracted with each other and when the basis of their indirect relationship is not a tangible product, but rather an intangible

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<sup>26</sup> *Santucci Construction Co. v. Baxter & Woodman, Inc.*, 502 N.E.2d 1134, 1139 (Ill.App. 1987); see also Sidney R. Barrett, *Recovery for Economic Loss in Torts for Construction Defects: A Critical Analysis*, 40 S.C.L. REV. 891, n. 2 (1989) (noting that "the economic loss doctrine has no application to intentional torts, such as the tort of intentional interference with contractual or business relations. In such cases, the very object of the wrongful conduct is to harm the plaintiff's economic interests, and recovery is allowed.") (citing *Waldinger Corp. v. Ashbrook-Simon-Hartley, Inc.*, 564 F. Supp. 970 (C.D.Ill.1983)).

service.”<sup>27</sup> Similarly, in the instant case, Plaintiff and Defendants were not in privity of contract and thus Plaintiff cannot sue Defendants for breach of contract.

In *Aikens v. Baltimore & Ohio Railroad Co.*, the Pennsylvania Superior Court held that the economic loss doctrine barred recovery for negligent tortious interference with contract; however, the court noted that “a cause of action exists in this situation only if the tortious interference was intentional or involved parties in a special relationship to one another.”<sup>28</sup>

This Court finds persuasive the logic and reasoning of the non-Delaware authorities cited above. Therefore, taking into account analogous Delaware case law and the “emerging trend” throughout the country, this Court finds that the economic loss doctrine does not bar Plaintiff’s claim for tortious interference with contract.

#### **B. The Doctrine of Collateral Estoppel Does Not Bar Plaintiff’s Claim for Tortious Interference with Contract**

In order for the doctrine of collateral estoppel to apply, a court must determine whether:

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<sup>27</sup> *Shands Teaching Hosp. and Clinics, Inc. v. Beech Street Corp.*, 899 So.2d 1222, 1229 (Fla.App. 1 Dist., 2005) (quoting *Indemnity Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So. 2d 532 (Fla. 2004)).

<sup>28</sup> *Aikens v. Baltimore & Ohio Railroad Co.*, 501 A.2d 277, 278 (Pa. Super. 1985).

(1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.<sup>29</sup>

With respect to the first requirement, the issue apparently decided by DAPE was whether Defendants violated Section 3, Paragraphs A and B of DAPE's Code of Ethics—in essence, DAPE decided that Defendants did not provide false or unsubstantiated information. In contrast, Plaintiff's complaint now before this court alleges tortious interference with contract.

A plaintiff must establish the following elements to sustain a claim for tortious interference with contract: “(1) a contract, (2) about which defendant knew and (3) an intentional act that is a significant factor in causing the breach of such contract (4) without justification (5) which causes injury.”<sup>30</sup> While the same facts may well apply to both the complaint filed with DAPE and the instant cause of action, the analysis is not the same because the issues are different. Therefore, because the issues presented to

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<sup>29</sup> *Betts v. Townsends, Inc.*, 765 A.2d 531, 535 (Del. 2000).

<sup>30</sup> *Luscavage v. Dominion Dental USA, Inc.*, 2007 WL 901641, \*2 (Del. Super.) (citing *Irwin & Leighton, Inc. v. W.M. Anderson Co.*, 532 A.2d 983, 992 (Del. Ch. 1987).



the DAPE and this Court are not “identical,” the doctrine of collateral estoppel does not preclude Plaintiff’s instant claim.<sup>31</sup>

### **C. Plaintiff’s Claim Is Not Barred by Witness Immunity**

Defendants contend that Plaintiff’s complaint relies on statements made by Defendant Baker during the underlying litigation, and argues that this case should be dismissed because Baker is protected by witness immunity because Plaintiff’s complaint relies on Baker’s testimony in the underlying litigation.<sup>32</sup> However, Plaintiff contends that his cause of action arose prior to the trial in the underlying litigation when Defendants advised Cornerstone to withhold payment from Plaintiff.<sup>33</sup> Therefore, Defendants’ claim cannot be dismissed on the basis of witness immunity.

### **D. Plaintiff’s Claim that Defendants’ Interference was Improper (Because the Advice Was Not “Truthful” or “Honest”) Cannot be Dismissed at this Juncture**

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<sup>31</sup> Because the Court finds that the first element necessary for a finding of collateral estoppel is not met, the Court need not reach the three remaining elements.

<sup>32</sup> See *Nix v. Sawyer*, 466 A.2d 407, 410 (Del. Super. 1883) (holding that a witness is entitled to immunity from suit for statements made in the course of judicial proceedings where the statement was relevant to a contested issue in the case).

<sup>33</sup> Compl. at 2-3. Defendants belatedly raise a statute of limitations defense as to the pre-trial statements. Defs. Letter of Dec. 30, 2008, D.I. 23 at 1-2. However, because Defendants failed raise this issue in their Motion to Dismiss or Reply, the Court will not consider a statute of limitations defense in connection with this motion to dismiss.

Delaware courts have adopted the Restatement (Second) of Torts when analyzing tortious interference with contract relations.<sup>34</sup>

Section 772 (“Advice as Improper or Proper Interference”) states:

One who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual relation with another does not interfere improperly with the other's contractual relation, by giving the third person

(a) truthful information, or

(b) honest advice within the scope of a request for the advice.

Plaintiff’s complaint alleges that Defendants’ advice was untruthful and non-objective.<sup>35</sup> Therefore, because the Court is now required to accept as true the allegations in the complaint, Defendants motion to dismiss on this ground is denied.

## **VI. CONCLUSION**

For the foregoing reasons, Defendants’ Motion to Dismiss is **DENIED.**

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oc: Prothonotary

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<sup>34</sup> *Bobson v. Gulfstream Marketing, Ltd.*, 605 A.2d 583, 586 (Del. Super. 1992) (citing *Irwin & Leighton v. W.M. Anderson Co.*, 532 A.2d 983 (Del.Ch. 1987) (noting that Delaware adopted the Restatement (Second) of Torts and that Section 772 provides that person does not interfere improperly with another’s contractual relation by giving truthful or honest advice).

<sup>35</sup> Compl. at ¶ 18, 23. Pursuant to paragraph 29, paragraphs 1-28 are incorporated by reference, and thus Plaintiff’s allegations that Baker’s advice was “untruthful,” “dishonest,” and “not objective,” must be considered in connection with Plaintiff’s tortious interference with contract claim.